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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

In re: GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Petitioners.

PLAINTIFFS-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF CASE

Pursuant to Rule 24.2 of the Supreme Court Rules, Plaintiffs-Respondents state that Defendants-Petitioners have not set forth a statement of the case in their Petition for Writ of Mandamus ("Petition"), separately denominated as such, but that the following inaccuracies in the untitled preamble of the Petition and in Petitioners' "Statement of Facts" must necessarily be corrected.

First, Petitioners state at pages two and three of their Petition that District Court Judge Dowd "pointed out . . . in his dissent" below that there was "extraordinary hardship connected with further prolonging" the Ohio reapportionment case, and that Plaintiffs-Respondents' newly-asserted claim was "clearly frivolous." Petitioners provide no citation to the record for these statements because there is no record reference to support them. Judge Dowd's three-sentence dissent in the District Court does not contain the statements attributed to him by Petitioners, nor is that dissent fairly capable of being reasonably interpreted to imply such statements. Petition, Appendix C, p. 27a.

Second, the final footnote to Petitioners' "Statement of Facts" (Petition, p. 10, n.4) is not a factual statement at all but is, instead, an argument about malevolent motives the District Court allegedly had for stating its reasons for permitting the amendment which Petitioners now challenge. Claimed inconsistencies among the District Court's reasons for permitting the amendment plainly do not exist when the specific statements of those reasons are examined in context. Specifically, it is quite true that Plaintiffs' original claims below were closely related to the concerns in *Shaw v. Reno*, —— U.S. ——, 113 S. Ct. 2816 (1993), in that both cases involved constitutional redistricting challenges, with similar evidentiary arrays. However, it is also true that the *Shaw* issue is fundamentally different from the issues previously raised below because the close scrutiny standard to be applied to a race-based districting plan under the Equal Protection Clause of the Fourteenth Amendment (*i.e.*, a *Shaw*-like claim) is fundamentally different from the standard to be applied to a one-person one-vote claim under the Fourteenth Amendment, from the standard to be applied to a Fifteenth Amendment Claim of intentionally discriminatory vote dilution, and from the effects standard to be applied to a claim under § 2 of the Voting Rights Act, which the District Court previously addressed.

With the foregoing exceptions, and excepting Petitioners' penchant for historical irrelevancy in presenting its case for mandamus, Plaintiffs-Respondents are essentially satisfied with Defendants-Petitioners' statements about the recent occurrences in this case which prompted the filing of the Petition for Writ of Mandamus.

SUMMARY OF ARGUMENT

The District Court did not violate this Court's mandate in *Voinovich v. Quilter*, —— U.S. ——, 113 S. Ct. 1149 (1993), when it granted Plaintiffs-Respondents leave to amend their complaint to assert a claim of impermissible race-conscious redistricting, in violation of

the Fourteenth Amendment, pursuant to *Shaw v. Reno*, —— U.S. ——, 113 S. Ct. 2816 (1993), as a challenge to the Ohio reapportionment plan. The *Shaw*-like claim was not among the matters decided by this Court in *Voinovich*—in fact, this Court expressly declined to make such a decision in *Voinovich*—and, in accordance with the so-called "mandate rule" typified by such cases as *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139 (1979) and *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 59 S. Ct. 777 (1939), the District Court therefore could not have violated the *Voinovich* mandate when it allowed Respondents to assert that claim on remand.

Defendants-Petitioners have failed to make out a case warranting the issuance of the extraordinary writ of mandamus. The matter of amendments to pleadings is a matter committed to the discretion of the District Court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S. Ct. 795, 802 (1971). Petitioners have not shown any substantial prejudice, hardship or extraordinary circumstance which would support the requested relief of controlling the District Court's exercise of discretion, restraining it from proceeding on the amendment, and effectively directing the entry of judgment against the *Shaw*-like claim asserted by the amendment without any determination at any time about the merits of such a claim as a challenge to the Ohio reapportionment plan.

Finally, Petitioners are incorrect in suggesting that amendments to pleadings are implicitly prohibited on remand. Petitioners' case citations do not support such a *per se* prohibition, and there is ample Circuit Court authority supporting the propriety of amendments to pleadings on remand.

For these reasons, Petitioners' Petition for a Writ of Mandamus, directing the District Court to vacate its order granting Plaintiffs leave to amend their complaint, and directing the District Court to enter final judgment for Defendants, must be overruled.

ARGUMENT

I. INTRODUCTION

In *Voinovich v. Quilter*, —— U.S. ——, 113 S. Ct. 1149 (1993), this Court considered three claims and made three corresponding determinations: (1) this Court rejected Plaintiffs' claim and the District Court's conclusion that the Ohio reapportionment plan violated § 2 of the Voting Rights Act (*id.*, 113 S. Ct. at 1155-58); (2) this Court rejected Plaintiffs' claim and the District Court's conclusion that the Ohio reapportionment plan violated the Fifteenth Amendment to the United States Constitution by intentionally diluting minority voting strength (*id.*, 113 S. Ct. at 1158-59); and (3) this Court found that Plaintiffs had established a prima facie case of a violation of the Fourteenth Amendment to the United States Constitution because electoral districts under the Ohio reapportionment plan excessively deviated from one-person one-vote standards, and it remanded the case for further determination by the District Court as to whether those deviations were justified (*id.*, 113 S. Ct. at 1159-60).

In *Voinovich*, this Court did *not* consider or make any determination about any claim that the Ohio reapportionment plan violated the Fourteenth Amendment to the United States Constitution because it consciously separates voters by race, a claim which was first recognized by this Court in *Shaw v. Reno*, —— U.S. ——, 113 S. Ct. 2816 (1993), decided some three months after *Voinovich*. Indeed, in *Voinovich*, this Court explicitly noted that a race-conscious redistricting claim under the Fourteenth Amendment had not been presented by the parties or determined by the District Court, and this Court expressly disclaimed any opinion about the matter. *Voinovich*, —— U.S. at ——, 113 S. Ct. at 1157.

Upon remand, the District Court in *Voinovich* determined that the excessive deviations in Ohio's electoral district populations are justified, disposing of the last of

the three claims which had been considered by this Court in *Voinovich*. Ruling further, the District Court also granted leave for Plaintiffs to amend their complaint to assert a *Shaw*-like claim of impermissible race-based districting in violation of the Fourteenth Amendment, as a challenge to the Ohio plan.

Petitioners, herein, who are the Defendants in *Voinovich*, now ask this Court to issue the extraordinary writ of mandamus to restrain the District Court from proceeding on Plaintiffs' new claim of impermissible race-based redistricting, and to direct the District Court to enter final judgment in Defendants' favor. Defendants ask this Court to issue that extraordinary writ, and thereby to effectively enter a peremptory judgment against Plaintiffs on their newly-asserted *Shaw* claim, even though, as indicated above, neither this Court nor the District Court has ever made any determination about the merits of such a challenge to the Ohio reapportionment plan.

Remarkably, Petitioners' request for the issuance of that extraordinary writ, to accomplish that rather extraordinary end, is essentially based on nothing more than one word—"only"—which appears in the first part of this Court's opinion in *Voinovich*, and which Petitioners seize upon, out-of-context, to suggest that this Court intended in *Voinovich* to forever foreclose any consideration of any challenge to Ohio's reapportionment plan other than the matter of unequal district sizes. Apparently, Petitioners are of the view that this Court's use of the word "only" in the *Voinovich* opinion was intended to signal that Ohio's reapportionment scheme, alone among the fifty states, was to be exempt from the close scrutiny of race-based redistricting plans under the Fourteenth Amendment as subsequently recognized in *Shaw*; and that this Court's use of the word "only" in the *Voinovich* opinion was intended to signal such a remarkable exemption even though this Court explicitly disclaimed in the *Voinovich* opinion any view about the propriety of a *Shaw*-like challenge to the Ohio plan.

Petitioners' request for the extraordinary writ of mandamus is unwarranted and unsupported, and it must be rejected. As is shown in part II below, the District Court did not violate this Court's directions on remand when it granted leave for Plaintiffs to amend their complaint. On the contrary, the District Court's action was perfectly proper under the so-called "mandate rule," since the newly-asserted claim was not the subject of any determination made by this Court in *Voinovich*. In part III below, Respondents show that, in any event, Petitioners have failed to make the extraordinary showing required to obtain the interlocutory relief they seek to obtain by mandamus. Finally, in part IV below, Respondents also show that Petitioners' legal authority does not support Petitioners' suggestion, contrary to the "mandate rule," that pleadings cannot be amended on remand.

II. THE DISTRICT COURT ORDER GRANTING LEAVE TO AMEND TO ASSERT A *SHAW*-LIKE CLAIM DOES NOT VIOLATE THIS COURT'S REMAND ORDER IN *VOINOVICH*

The amendment of pleadings is within the sound discretion of the trial court, a point which the Petitioners must concede and have conceded. Petition for Writ of Mandamus ("Petition"), p. 17. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S. Ct. 795, 802 (1971). Nevertheless, Petitioners would have this Court issue the extraordinary writ of mandamus, to restrain the District Court and effectively enter judgment against the claim asserted by amendment, in circumstances where this Court explicitly abstained from passing on the issue which is the subject of the amended pleading. To justify the issuance of the writ, Petitioners contend that the District Court has violated this Court's directive on remand.

Simply stated, if the claim raised by the amended pleading was not within the scope of the case when heard by this Court (a point again conceded by Petitioners,

Petition, p. 16), then it can hardly be said to have been within the scope of, and foreclosed by, this Court's mandate on remand. With respect to the Fourteenth Amendment issue discussed in *Shaw*, this Court stated in *Voinovich* (which was decided three months before *Shaw*):

> "Appellee's complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here. Accordingly, we express no view on how such a claim might be evaluated."

Voinovich, —— U.S. at ——, 113 S. Ct. at 1157.

The statements by this Court that 1) "the District Court . . . did not address the issue," and 2) that the complaint did not allege the State's conscious use of race violates the Equal Protection Clause, and 3) that this Court expresses "no view on how such a claim might be evaluated," are dispositive of the Petitioners' argument that this Court's mandate foreclosed consideration of the issue raised by the amended pleading. *Id.* While the District Court may not reconsider issues decided by the Supreme Court, "on the remand a lower court is free as to other issues." *Quern v. Jordan*, 440 U.S. 332, 347, 99 S. Ct. 1139, 1148, n.18 (1979) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168, 59 S. Ct. 777, 781 (1939)).[1]

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[1] Petitioners' argument, in a footnote to their Petition, that *Quern v. Jordan* is inapposite to the issue before this Court, is without merit. Like this case, the mandate considered in *Quern* remanded the case to the trial court " 'for further proceedings consistent with this opinion.' " *Id. See Voinovich*, —— U.S. at ——, 113 S. Ct. at 1159-60 (remanding "for further proceedings in conformity with this opinion.")

Petitioners are wrong in stating that *Quern* "merely concluded that the law of the case doctrine did not foreclose the lower court's considerations of issues left open by this Court's mandate." Petition, p. 13, n.5. In *Quern* the Court expressly considered the claim

Petitioners seek to counter the clear abstention statements of this Court by relying on another section of the *Voinovich* opinion for their view that this Court did not leave the *Shaw* issue open. Thus, Petitioners repeatedly cite the statement of this Court that it was remanding "only" for further proceedings on the population deviation issue. *Voinovich*, —— U.S. at ——, 113 S. Ct. at 1154. The District Court understood this to mean in context that this Court was simply indicating that it was remanding only one of the three claims considered, and that what was not being remanded were the Voting Rights Act claim and the Fifteenth Amendment claim. Logic and a full reading of the *Shaw* opinion compel that conclusion. As the District Court said, "[t]hough it is presumably within the Court's power to order us not to consider any other issues, this one time use of the word 'only' does not demonstrate that it meant to do so." Petition, Appendix C, p. 24a.

The so-called "mandate rule," announced in *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168, 59 S. Ct. 777,

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that the District Court lacked power to order notice under the terms of this Court's remand stating that:

> "The simple answer to this contention is that we remanded the matter in *Edelman* 'for further proceedings consistent with this opinion,' and we hold today that the award of notice relief, as fashioned by the Court of Appeals, is not inconsistent with either the spirit or express terms of our decision in *Edelman*. 'While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues.' "

Quern, 440 U.S. at 347, 99 S. Ct. at 1148 n.18 (quoting *Sprague*, 307 U.S. at 168, 59 S. Ct. at 781).

Moreover, in the same footnote, Petitioners mischaracterize *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 125 (1992), in arguing that the court in that case determined that its earlier mandate did not bar consideration of an issue because "this court made no determinations on the merits of [appellant's] case." Rather, that decision determining that the mandate did not preclude the consideration of an issue (consent to a search by police officers) turned on the fact that this issue "figures nowhere in the legal analysis of either the majority opinion or the dissent." *Id.*

781 (1939) and followed in *Quern, supra,* is clear that the principle applicable to such circumstances is the law of the case doctrine. "As with all applications of the law of the case doctrine, the trial court may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court." *Jones v. Lewis,* 957 F.2d 260, 262 (6th Cir.), *cert. denied,* —— U.S. ——, 113 S. Ct. 125 (1992).

Under the mandate rule, upon remand the *Voinovich* District Court could not reconsider the allegations of violations of § 2 of the Voting Rights Act and the Fifteenth Amendment, the only claims actually resolved by this Court. Under the *Quern* doctrine, "on remand a lower court is free as to other issues." *Quern,* 440 U.S. at 347, 99 S. Ct. at 1148, n.18 (quoting *Sprague,* 307 U.S. at 168, 59 S. Ct. at 781).

Without articulating the argument explicitly, Petitioners appear to be deriving from this Court's use of the word "only" in the *Voinovich* opinion some application of a new form of *res judicata,* which would ascribe to the law of the case doctrine—concerning matters actually decided—the characteristics of merger and bar which might follow a final judgment. What is lacking here, however, is the final judgment. This Court has stated it as "familiar law that only a final judgment is *res judicata.*" *G. & C. Merriman Co. v. Saalfield,* 241 U.S. 22, 28, 36 S. Ct. 477, 480 (1916). Until there is a final judgment under the substantive and procedural law of the forum, the District Court's orders remain interlocutory and subject to modification at any time until entry of a judgment disposing of all of the rights and liabilities of the parties, except to the extent that this Court might explicitly determine and dispose of a particular issue upon an intervening appeal. As noted above, this Court explicitly declined to determine or dispose of the *Shaw* issue in this case. Accordingly, the District Court is not now foreclosed from considering it, and it does not violate this Court's instructions on remand in proceeding so to do.

III. PETITIONERS HAVE FAILED TO MAKE THE EXTRAORDINARY SHOWING REQUIRED TO SUPPORT THE ISSUANCE OF THE EXTRAORDINARY WRIT OF MANDAMUS

Petitioners concede that, "[o]rdinarily, the amendment of pleadings is a matter within the sound discretion of the trial court." Petition, p. 17. Nonetheless, Petitioners would have this Court issue the extraordinary writ of mandamus to control the District Court's exercise of discretion. Nowhere, however, do the Petitioners even remotely attempt to justify the use of the writ of mandamus except in connection with the arguments concerning the scope of the remand. That is to say, the remainder of the Petition is devoted to addressing Petitioners' differences with the District Court's exercise of discretion, and Petitioners' interest in controlling the District Court's discretion. The purpose of the writ "is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power." *Will v. United States*, 389 U.S. 90, 104, 88 S. Ct. 269, 278 (1967) (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S. Ct. 145, 148 (1953)).

An extraordinary writ, like a writ of mandamus, " 'may not be used to thwart the congressional policy against piecemeal appeals.' " *Will*, 389 U.S. at 104, 88 S. Ct. at 278 (quoting *Parr v. United States*, 351 U.S. 513, 520-21, 76 S. Ct. 912, 917 (1956)). The burden which the Petitioners must discharge is to show that appeal is an inadequate remedy because, as was stated in *Ex Parte Fahey*, 332 U.S. 258, 260, 67 S. Ct. 1558, 1559 (1947), "[t]hese remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal."

The Petitioners' argument that the District Court violated the scope of the mandate must be the cornerstone upon which they rest their motion because the issue of whether a three-judge panel should have permitted a com-

plaint to be amended is not an issue upon which this Court should grant mandamus. Rulings that are within the discretion of the trial court are not matters upon which a petitioner can show violation of a "clear and indisputable" right or "usurpation of power" by the trial court. Thus, "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' " *Allied Chem. Corp. v. Diaflon, Inc.*, 449 U.S. 33, 36, 101 S. Ct. 188, 191 (1980) (per curiam). *Accord: In re American Airlines, Inc.*, 972 F.2d 605, 609 (5th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1262 (1993); *In re Bushkin Assoc., Inc.*, 864 F.2d 241, 245 (1st Cir. 1989); *In re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir. 1984); *Delano v. Kitch*, 663 F.2d 990, 1002 (10th Cir. 1981), *cert. denied*, 456 U.S. 946, 102 S. Ct. 2012 (1982). It is clear that the party seeking mandamus "has 'the burden of showing that its right to issuance of the writ is "clear and undisputable." ' " *Will*, 389 U.S. at 96, 88 S. Ct. at 274 (quoting *Bankers Life*, 346 U.S. at 384, 74 S. Ct. at 148).

This Court has repeatedly stated its views concerning the severity of the standard to be applied to petitions for the writ of mandamus. Petitions for writ of mandamus in the Supreme Court are subject to a "stringent standard." *Gulf Stream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289, 108 S. Ct. 1133, 1144 (1988). "This Court has repeatedly observed that the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Id.*, 108 S. Ct. at 1143. *Accord: Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 402, 96 S. Ct. 2119, 2123 (1976) ("the remedy of mandamus is a drastic one to be invoked only in extraordinary situations"); *Allied Chem. Corp.*, 449 U.S. at 34, 101 S. Ct. at 190. "The preemptory common-law writs are among the most potent weapons in the judicial arsenal. 'As extraordinary remedies, they are reserved for really extraordinary causes.' " *Will*, 389 U.S. at 107, 88

S. Ct. at 280 (quoting *Ex Parte Fahey*, 332 U.S. at 260, 67 S. Ct. at 1559). Mandamus, it must be remembered, does "not run the gauntlet of reversible errors." *Bankers Life*, 346 U.S. at 382, 74 S. Ct. at 147.

In addition, as stated in *Will v. United States*, the basis for issuing the writ of mandamus is to protect appellate *jurisdiction*. Nothing is more fundamental in Supreme Court jurisprudence than that this Court's *original* jurisdiction is narrowly circumscribed by the text of Article III, Section 2 of the Constitution, which, as held in *Marbury v. Madison*, 5 U.S. 137 (1803), does not permit this Court to hear original actions in mandamus. Under *Marbury v. Madison*, this Court's "statutory authority to issue writs of prohibition or mandamus to district courts can be constitutionally exercised only insofar as such writs are *in aid* of its *appellate* jurisdiction." *Ex Parte Republic of Peru*, 318 U.S. 578, 582, 63 S. Ct. 793, 796 (1943) (emphasis added). This narrow basis for mandamus in this Court is reflected in the language of the All Writs Act, 28 U.S.C. § 1651(a), which states that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." (Emphasis added.) Thus, the mandamus inquiry is limited to either "confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so." *Ex Parte Republic of Peru*, 318 U.S. at 583, 63 S. Ct. at 796-97, not sitting as a super trial court to review discretionary rulings piecemeal.

The issue of the propriety of the amendment, then, for purposes of *this* petition for the extraordinary writ of mandamus, is confined solely to the question of whether the amendment "clear[ly] and indisputabl[y]" violated this Court's mandate. As demonstrated above, the District Court's decision plainly did not violate this Court's mandate, and Petitioners have failed to make any showing to the contrary.

Nonetheless, even if it were assumed, solely for the sake of argument, that deviation from this Court's mandate was established, Petitioners would still have failed to establish the kind of exceptional prejudice, hardship, or extraordinary circumstance, that would warrant the issuance of the extraordinary writ. In this regard, on the merits of the issue of whether the motion to amend properly should have been granted, the District Court found that "[i]f the plaintiffs have a meritorious constitutional claim here under *Shaw*, it would be unfair in the extreme for that challenge to go unheard simply because *Shaw* was decided after the complaint was filed." Petition, Appendix C, p. 26a. With respect to the argument that Plaintiffs should have included the *Shaw* issue in their complaint, the District Court noted that:

> "*Shaw* held for the first time that a plaintiff can state a claim under the Equal Protection Clause by alleging that a districting plan reflects 'an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.' . . . As the [Supreme] Court stated:
>
> > 'Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.' "

Id. at 21a (citation omitted).

With respect to the Petitioners' assertions of "hardship" in allowing the amendment, the District Court observed that the matters relating to a *Shaw*-like claim were so clearly linked in the earlier proceedings, "that the relevant facts have already been developed and the issues were in part explored in the earlier hearing. The future litiga-

tion burden is correspondingly reduced, and this case involves competent attorneys on both sides who can easily make the adjustment to representing their clients with respect to the [newly-asserted] *Shaw* issue." *Id.* at p. 25a.

Finally, with respect to the matter of prejudice, Petitioners themselves define the operative consideration in this case as essentially being nothing more than "doubt" about the validity of Ohio's reapportionment plan. Petition, p. 20. In fact, Petitioners expressly seek the extraordinary writ of mandamus for no apparent reason other than to "erase that doubt." *Id.*

However, "doubt" about the validity of the plan under *Shaw*, as raised by the amended pleading, hardly constitutes extraordinary prejudice warranting the issuance of the extraordinary writ of mandamus. Indeed, if it would be considered to be prejudice of this character, then one would expect this Court to issue writs of mandamus directing the dismissal of any new and separate lawsuit which might be commenced to challenge the Ohio reapportionment plan under *Shaw*, because such independent litigation also would raise "doubt" about the plan.

The extraordinary writ of mandamus obviously is not intended to be issued to control a new claim which raises a previously unresolved issue of federal constitutional law —whether that new claim is raised in a pending lawsuit or in a new lawsuit. The alleged prejudice of "doubt" that flows from examination of a new claim in a lawsuit is ordinary, and is not sufficient grounds for issuing the extraordinary writ.

IV. PETITIONERS' LEGAL AUTHORITY DOES NOT SUPPORT THE SUGGESTION, CONTRARY TO THE "MANDATE RULE," THAT PLEADING AMENDMENTS ARE PROHIBITED ON REMAND

Petitioners essentially suggest (Petition, pp. 17-18) that there is an implicit, absolute bar to the amendment of pleadings on remand. Not only is this suggestion contrary

to the "mandate rule" previously discussed, but it is not supported by the case law cited by Petitioners.

Petitioners' reliance upon *Worley v. Columbia Gas of Kentucky, Inc.*, 491 F.2d 256, 265 (6th Cir. 1973), *cert. denied*, 417 U.S. 970, 94 S. Ct. 3174 (1974)—that there is such an absolute bar to an amendment of a complaint after remand, where the amendment raises issues not within the theory on which the case was tried—is without merit. The *Worley* case is distinguishable from the instant case because in *Worley* the judgment of the district court was reversed and the case was remanded with instructions to dismiss the case. Thus, in *Worley* the appellate opinion made a final disposition of the case.

Likewise, *United States ex rel. Townsend v. Oglivie*, 360 F.2d 925, 925-26 (7th Cir.), *cert. denied*, 385 U.S. 938, 87 S. Ct. 304 (1966), involved a mandate of the appellate court directing the district court to dismiss the petition. Further, *Equitable Life Assurance Soc'y v. Mercantile-Commerce Bank & Trust Co.*, 155 F.2d 776, 779 (8th Cir.), *cert. denied*, 329 U.S. 760, 67 S. Ct. 114 (1946), cited by Petitioners (Petition, pp. 17-18), does not support the proposition that there is an inflexible rule barring amendments to pleadings after remand. Rather, in that case, leave to amend an answer on remand to assert an additional defense was denied primarily because the additional defense of abandonment had previously been tried and resolved against the defendant at trial as a part of the trial court's determination of defenses of waiver, estoppel and laches. *Equitable Life*, 155 F.2d at 779. Where, as here, the appellate court did not issue a mandate ordering a final disposition of the case, the District Court on remand is not barred from granting leave to amend a complaint to add a new issue.

Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983), is equally not on point. That case involved the issue as to whether a district court, in a preliminary injunction hearing which allegedly decided unpleaded claims without

the consent of one of the parties, acted unfairly. It does not support the proposition that on remand the District Court is absolutely barred from considering issues not resolved by the appellate court. Finally, *Cohen v. Illinois Inst. of Technology*, 581 F.2d 658, 662 (7th Cir. 1978), *cert. denied*, 439 U.S. 1135, 99 S. Ct. 1058 (1979) is distinguishable because in that case the appellate court specifically directed the trial court to consider a motion to amend the complaint. It does not support the proposition urged by Petitioners that leave to amend may never be granted after remand.

The fact is that federal courts do permit amendments on remand to add new issues. *City of Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 341 (8th Cir.) ("[a]n amendment can be proper after remand to the district court even if the claim was presented for the first time on appeal or had not been presented to the district court in a timely fashion"), *cert. denied*, 464 U.S. 893, 104 S. Ct. 238 (1983); *Ward Petroleum Corp. v. Federal Deposit Ins. Corp.*, 903 F.2d 1297, 1301 (10th Cir. 1990) ("on remand the district court may allow defendants to amend their pleadings if 'justice so requires,' " to add an affirmative defense not previously asserted in the trial court) (quoting Fed. R. Civ. P. 15(a)); *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1125 (8th Cir. 1985) (" '[a]n amendment can be proper after remand to the district court even if the claim . . . had not been presented to the district court in a timely fashion' ") (quoting *City of Columbia*, 707 F.2d at 341 (citations omitted)), *cert. denied*, 475 U.S 1046, 106 S. Ct. 1263 (1986).[2]

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[2] The case of *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 970 (6th Cir. 1973), *cert. denied*, 416 U.S. 939, 94 S. Ct. 1942 (1974), cited by Petitioners (Petition, p. 18 n.10) does not establish an absolute prohibition against granting leave to amend a complaint after remand to raise a new issue which was not expressly the subject of a remand order. The court in *Troxel* did not announce an inflexible rule against amendments of pleadings after remand, but recognized that the decision to grant or deny a motion for leave to amend after remand is within the sound discretion of the

Accordingly, this Court's mandate in *Voinovich* does not bar the granting of Respondents' motion to file a Second Amended Complaint to assert a claim (not addressed on appeal) that the State's conscious use of race in redistricting violates the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons, this Court must overrule Petitioners' Petition for a Writ of Mandamus, and the District Court should be permitted to proceed, undisturbed, to consider Plaintiffs' *Shaw*-like challenge to Ohio's reapportionment plan as being violative of the Fourteenth Amendment because it constitutes impermissible race-conscious redistricting.

Respectfully submitted,

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district court and will be reversed only for an abuse of discretion. Likewise, *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1259 (6th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 2889 (1991), cited by Petitioners (Petition, p. 17), recognized that the decision to permit amendments to pleadings after remand lies within the sound discretion of the trial court subject to the abuse of discretion standard of review.